

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 77 of 2019

BETWEEN : **FIJI SUGAR CORPORATION LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Drasa Avenue, Balawa, Lautoka, Fiji.

Plaintiff

A N D : **JOHN THAGGARD** of FSC Compound, Rarawai Mill, Rakiraki.

First Defendant

A N D : **JOSAIA DAU** of FSC Compound, Rarawai Mill, Rakiraki.

Second Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Ms. S. Daven for the Plaintiff
The Defendants are in person

Date of Hearing : 17.02.2020

Date of Judgment : 18.02.2020

JUDGMENT

01. The plaintiff summoned its two ex-employees – the defendants, pursuant to section 169 of the Land Transfer Act (Cap 131) to show cause why they should not give up vacant possession of official quarters they are occupying despite the notice to vacate being served on them, after termination of their services by the plaintiff company. The summons seeks the following orders:

- a. The first defendant to show cause why he should not give immediate vacant possession of the premises described as Staff Quarters No. 63 and situated on the land legally described as Certificate of Title No. 11349 being Lot 1 on Deposit Plan No 2768;

- b. The second defendant to show cause why he should not give immediate vacant possession of the premises described as Staff Quarters No. RMNSH 98 and situated on the land legally described as Certificate of Title No. 11349 being Lot 1 on Deposit Plan No 2768;
- c. That the cost of and incidental to this application to be paid by both the defendants.

- 02. The summons is supported by an affidavit – the supporting affidavit sworn by Davendra Prasad – the Employment Relations Manager of the plaintiff company. The supporting affidavit contains six annexures marked as “DP 1” to “DP 6” respectively. The annexure “DP 1” is the letter authorizing the deponent to swear the supporting affidavit on behalf of the plaintiff company. The annexure “DP 2” is the copy of Certificate of Title duly certified by the Registrar of Titles. The annexures “DP 3” and “DP 4” are the copies of two letters sent by the General Manager – Corporate Service of the plaintiff company to both defendants summarily dismissing them from the service. The annexure “DP 5” and “DP 6” are the copies of two letters sent by the same manager of the plaintiff company to the defendants to quit the official quarters – the subject properties in this matter.
- 03. The defendants, upon service of this summons, appeared in person and informed the court that, they applied for legal aid assistance to contest this matter. The court granted them time and finally their application for legal aid was rejected. The defendants were given further time thereafter to file their affidavit in opposition which they filed later. However, the defendants did not attach any document with their affidavit. The plaintiff company thereafter filed the affidavit in reply sworn by the same officer who sworn the supporting affidavit.
- 04. At hearing of the summons, the counsel for the plaintiff made oral submission based on all affidavits filed in this matter. The defendants appearing in person relied on their respective affidavits. They further informed the court that, their grievance at Employment Tribunal was heard and the ruling date has now been fixed.
- 05. The law and procedure on the summary eviction under the Land Transfer Act (Cap 131) have been settled in many cases by this court and the appellate courts and there is quite number of decisions in this area which does not need much elaboration. However, it is necessary to briefly note the nature of the summary procedure enshrined in the Land Transfer Act (Cap 131) and the duty of each party under that procedure. The Land Transfer Act (Cap 131) was introduced to Fiji in 1971 and it repealed the Land (Transfer and Registration) Ordinance (see: section 178 of the Land Transfer Act). However, the other two legislations, namely Crown Land Act (now known as State Land Act), Native

Land Act (now known as iTaukei Land Act) continue to govern the lands fall under their purview. Both legislations were amended to bring them in line with the Land Transfer Act (Cap 131) which is based on the well-known Torrens System of Registration. The effect and application of the said system of registration, that was generally applied in certain countries in Pacific, was explained in Breskvar v. Wall (1971-72) 126 CLR 376 and Barwick C.J stated at page 385 that:

The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. (Emphasis added).

06. In that same case Windeyer J. concurring with the Chief Justice stated at pages 399 and 400 that:

*I cannot usefully add anything to the reasons that he and my brothers McTiernan and Walsh have given for dismissing this appeal. I would only observe that the Chief Justice's aphorism, that the Torrens system is not a system of registration of title but a system of title by registration. accords with the way in which Torrens himself stated the basic idea of his scheme as it became law in South Australia in 1857. In 1862 he, as Registrar-General, published his booklet, *A Handy book on the real Property Act of South Australia*. It contains the statement, repeated from the *South Australian Handbook*, that:*

".....any system to be effective for the reform of the law of real property must commence by removing the past accumulations, and then establish a method under which future dealings will not induce fresh accumulations.

This is effectuated in South Australia by substituting 'Title by Registration' for 'Title by Deed'..."

Later, using language which has become familiar, he spoke of "indefeasibility of title". He noted, as an important benefit of the new system, "cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown". This is an assertion that the title of each registered proprietor comes from the fact of

registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right. (Emphasis added).

07. It was equally held in **Fels and another v Knowles and another** (1907) 26 NZLR 604 by Stout C.J at page 620 as follows:

'The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.'

08. Accordingly, the registration is everything and it is the registration that confers the title to a person so registered. It is the title by registration and not registration of title. This system of registration cuts off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder or proprietor is in the same position as a grantee direct from the Crown/state. The registration is made the source of the title, rather than a retrospective approbation of it as a derivative right. The only exception is the actual fraud, and in absence of such fraud as provided in sections 39 to 41 of the Land Transfer Act, the registered proprietor shall have an indefeasible title. This was established by the Fiji Court of Appeal in **Subaramani v Sheela** [1982] 28 FLR 82 (2 April 1982) where the court held that:

*The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is *Fels v. Knowles* 26 N.Z.L.R. 608. At page 620 it is said:*

"The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

09. Thus, the Land Transfer Act (Cap 131) provides for title by registration and makes such title indefeasible except in case of actual fraud. As a result of this guarantee given to a registered proprietor, there was a need for a mechanism by which a registered proprietor could enforce his or her or its indefeasible right against any illegal occupant. This need was fulfilled by the special jurisdiction given to this court under the sections 169 to 172

of the Land Transfer Act. The underlying principle of this summary procedure is to protect the last registered proprietor, who has an indefeasible title, from illegal occupation by others at a minimal cost. Thus, having a summary procedure for eviction under those sections of the Land Transfer Act is the logical consequence of Torrens system of registration, which safeguards the title of last registered proprietor. The Fiji Court of Appeal concisely stated that, it is a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (per: *Mishra JA in Jamnadas v Honson Ltd* [1985] 31 FLR 62 at page 65).

10. The *Locus Standi* of a person who can invoke the jurisdiction of this court under this procedure is set out in section 169. The requirements of an application, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The sections 171 and 172 provide for the two powers that the court may exercise in dealing with the applications under section 169. The burden to satisfy the court on the fulfillment of the requirements, under sections 169 and 170, is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by respective party to the proceedings. However, dismissal of a summons shall not prejudice the right of a plaintiff to take any other proceedings to which he or she may be otherwise entitled, against any defendant. Likewise, in the case of a lessor summoning a lessee for default of rentals, if the lessee, before hearing of the summons, pays or tenders all rent due and all costs incurred by the lessor, the summons shall be dismissed by the court.

11. The plaintiff company annexed the copy of the Certificate of Title (**DP 2**) duly certified by the Registrar of Title to prove its locus to bring this summons. As per section 18 of the Land Transfer Act, a duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence of its contents. It is evident from the said Certificate of Title that, the plaintiff company is the last registered proprietor of the properties in dispute. Furthermore, the defendants (in paragraph 2 of the first defendant and paragraph 10 of the second defendant) expressly admitted that, the plaintiff company is the last registered proprietor of the properties in dispute. Thus, the locus of the plaintiff company is proved not only by the conclusive evidence, but also by the admission of both defendants.

12. The plaintiff also had given the full description of the properties and sufficient time for the defendants to prepare their defence. As such there is no dispute on the other two procedural requirements provided in section 170 of the Land Transfer Act (Cap 131).
13. The section 171 requires the proof and production of consent if any such consent is necessary. This matter had already been settled by His Lordship the former Chief Justice Anthony Gates (as His Lordship then was) in **Prasad v Chand** [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001). His Lordship held that:

"At first sight, both sections would seem to suggest that an Applicant should first obtain the Director's written consent prior to the commencement of section 169 proceedings and exhibit it to his affidavit in support. However I favour Lyons J.'s approach in Parvati Narayan v Suresh Prasad (unreported) Lautoka High Court Civil Action No. HBC0275 of 1996L 15th August 1997 at p 4 insofar as his Lordship found that consent was not needed at all since the:

"section 169 application (which is the ridding off the land of a trespasser) is not a dealing of such a nature as requires the Director's consent."

This must be correct for the Director's sanction is concerned with who is to be allowed a State lease or powers over it, and not with the riddance of those who have never applied for his consent. With respect I was unable to adopt the second limb of Lyons J's conclusion a few lines further on where his lordship stated that the order could be made conditional upon the Director's consent. For if the court's order of ejectment was not "a dealing" then such order would not require the Director's consent and the court would not be subject to section 13. The court is not concerned with the grant of or refusal of, consent by the Director, provided such consent is given lawfully. Consent is solely a matter for the Director. The statutory regime appears to acknowledge that the Director's interest in protecting State leases is supported by the court's order of ejectment against those unable to show cause for their occupation of the land which is subject to the lease. The court is asked to make an order of ejectment against a person in whose favour the Director either, has never considered granting a lease, or has never granted a lease. The ejectment of an occupier who holds no lease is therefore not a dealing with a lease. Such occupier has no title. There is no lease to him to be dealt with. The order is for his ejectment from the land. There is no need for a duplicating function, a

further scrutiny by the Director, of the Plaintiff's application for ejectment either before or after the judge gives his order”.

14. The section reads as ‘...if any consent is necessary...’ and the above authority clearly states that, the consent of the Director for the application under 169 is not necessary. Thus, the question of consent does not arise and a plaintiff is under no duty to obtain consent from the director of lands in applications under section 169 of the Land Transfer Act (Cap 131).
15. The above discussion clearly indicates that, the plaintiff in this matter passed the threshold under sections 169 and 170 of the Land Transfer Act Cap 131. The burden now shifts to the defendants to show cause their defence to remain in possession of the properties. The Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explained the duty of a defendant in application of this nature and held that:

"Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced." (Emphasis added)

16. The duty on the defendants as per the above authority is, not to produce any final or incontestable proof of their right to remain in the properties, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the properties in dispute. **Black's Law Dictionary** defines “tangible evidence” as “physical evidence that is either real or demonstrative” (10th Edition, page 678). Thus, duty of the defendants is to produce some real or demonstrative physical evidence and not bare assertions. A bare assertion is not sufficient for this purpose.
17. Furthermore, the Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act, which says “*he (judge) may make any order and impose any terms he may think fit*”. The Court held that:

“..but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide

words "or he may make any order and impose any terms he may think fit". These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required". (Emphasis added).

18. According to above decisions, the court is to decide whether a defendant adduced any real or demonstrative physical evidence establishing a right or supporting an arguable case for such a right, or even he failed to adduce such evidence whether an open court hearing is required or not, given the circumstances of a case.
19. The defendants in this matter neither claim proprietary, nor promissory estoppel in their affidavits. They only state in their affidavits (both defendants filed the identical affidavits – one is the verbatim of the other) that, they lodged the grievance at the Employment Tribunal against summary dismissal from the service and the application is pending in the Tribunal. At the hearing yesterday they further stated that, the Tribunal already heard their application and the ruling is pending. The defendants therefore moved the court to wait for the outcome of their application lodged in the Tribunal, stating that there is a likelihood of reinstatement to the service.
20. As stated in other cases too, I must re-emphasize the very reason of speedy process for vacant possession under section 169 of the Land Transfer Act (Cap 131) in this case too. It is the Torrens system of registration that resulted in the guarantee and protection for the last registered proprietor. The protection of indefeasible title from illegal occupation is the high priority of this registration system. This protection is not only against any illegal occupant of a particular land or property, but also is extended against any person who otherwise entered any property by a legal authority, but continued to occupy that property even after cessation of such authority or permission. That is why the section 169 (b) allows the lessor to bring the summons for eviction even the rental for a month is due. This shows that even a tenant, who legally entered any property, becomes an illegal occupant if the rental falls in arrears. At this point, the law does not allow considering any dispute between the lessor and lessee in relation to the tenancy agreement, but the court should grant order for vacant possession unless the full rental and cost paid before the hearing as provided in proviso of section 172 of the Land Transfer Act (Cap 131). The rationale is that, the moment any lessee fails to pay the rental, he or she should be evicted and the indefeasible title of the lessor, which is the high priority of the registration system, should be upheld. Any dispute relating to tenancy should be dealt with in an appropriate forum and not in this proceeding for eviction.
21. Same reasoning applies to any person who enters any property pursuant to an employment contract. The moment the employment contract is terminated, he or she

becomes illegal occupant in that property and ought to be evicted. Any dispute over the contract of employment which allowed the occupation of the property must be dealt with in an appropriate forum and certainly not in a proceeding under section 169 of the Land Transfer Act (Cap 131). In any event, the pendency of any proceeding in the court is not a sufficient cause to resist an application under section 169 of the Land Transfer Act. This was affirmed by the Fiji Court of Appeal in its decisions in the cases of **Dinesh Jamnadas & Others v. Honson Ltd.** FCA Civ. App. 22/85, [1985] 31 FLR 62 and **Muthusami v. Nausori Town Council** FCA 23/86 (unreported case and decided on 04.07.1986).

22. In both cases, other proceedings were pending in relation to the tenancy. In the first case (**Dinesh Jamnadas**) the High Court held that, existence of such proceedings was, by itself, not a cause sufficient to resist an application under section 169. In the other case (**Muthusami**), the High Court held that, mere institution of by writ did not by itself shut out a claim under section 169. The Fiji Court of Appeal upheld the decision of the High Courts in both cases. If a proceeding instituted by way of writ, in relation to a tenancy which initially allowed the defendants to occupy the properties in those two cases, cannot be considered by the court in a proper case under section 169 of the Land Transfer Act, how this court can consider a proceeding that is pending in the Employment Tribunal in relation to employment contract? Even the Tribunal holds in favour of the defendants and orders for reinstatement, they cannot, as of right, claim the official quarters, because providing official quarters is the discretion of the company subject always to availability. In any event, pendency of grievance at the Employment Tribunal is not a defence at all to the proceedings under section 169 of the Land Transfer Act (Cap 131).
23. The summary of the discussion is that, the plaintiff is the last registered proprietor of the properties described in the summons. The defendants who entered the property based on the employment contract continue to possess the same despite termination of their services and the notice being served on them requesting to deliver the vacant possession to the plaintiff company. The defendants have been in occupation since termination of their services in late January 2019, enjoying rental-free residency at the cost of the plaintiff company. The issues in this matter are straightforward and there are no complicated issues of facts. Gould V.P. delivering the unanimous judgment of Fiji Court of Appeal in **Ram Narayan v Moti Ram** (Civ. App. No. 16/83 FCA) stated:

"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way".

24. It follows that, the plaintiff company is entitled for immediate vacant possession in this case; the defendants ought to be evicted from the properties; and should be ordered to immediately deliver the vacant possession of the properties mentioned in the summons to the plaintiff company. Further, the plaintiff company should fairly be compensated in terms of cost incurred in bringing this application, since the defendants continued to illegally occupy the properties even after termination of their services.
25. In result, I make the following orders:
1. The defendants are ordered to immediately deliver the vacant possession of the properties described in the summons to the plaintiff company, and
 2. Each defendant should pay a summarily assessed cost of \$ 1,000 to the plaintiff company within a month from today.

**At Lautoka
18/02/2020**




U.L.Mohamed Azhar
Master of the High Court